U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue date: 05Nov2001

Case No. 1999-OFC-00011

In the Matter of:

U.S. DEPARTMENT OF LABOR,
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS
Plaintiff,

v.

BEVERLY ENTERPRISES, INC.,
Defendant

RECOMMENDED DECISION AND ORDER ON REMAND

On May 17, 1999, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") filed an administrative complaint alleging that Beverly Enterprises, Inc. ("Defendant") had failed to comply with its contractual obligations by refusing to submit to OFCCP the written affirmative action programs for the company's Fort Smith, Arkansas, headquarters. OFCCP requested expedited hearing procedures pursuant to 41 C.F.R. §60-30.31 et seq. On July 22, 1999, I issued a Recommended Decision and Order finding that Defendant had violated its obligations under the federal programs at issue. Defendant filed exceptions to the Recommended Decision and Order and the Administrative Review Board ("ARB") issued a Final Decision and Order on September 1, 1999. The ARB affirmed my finding that Defendant had violated its obligations. Upon appeal to the U.S. District Court for the District of Columbia, these findings were affirmed and the case was remanded in order to determine whether Defendant and its subsidiaries are a single entity so that the subsidiaries may be sanctioned for the actions of the parent company. Beverly Enterprises, Inc. v. Herman, Civ. A. No. 99-2408 (RMU)(D.D.C. August 24, 2000) (Memorandum Opinion).

OFCCP served Defendant with interrogatories and requests for production on August 16, 2001. On August 22, 2001, Defendant responded with a letter refusing to comply based on grounds that such discovery is not permitted under the expedited hearing procedures. OFCCP filed a motion requesting removal from expedited hearing procedures. On September 6, 2001, I granted OFCCP's motion and ordered the case to proceed under conventional rather than expedited hearing procedures.

On October 9, 2001, OFCCP filed a Motion to Compel Defendant to answer interrogatories and produce documents that were requested in discovery. Attached to the Motion to Compel was a letter from Defendant dated October 9, 2001, wherein Defendant declined to comply with discovery propounded by OFCCP asserting the discovery propounded by OFCCP was in violation of the provisions for expedited procedures. No other objections were made to the proposed discovery. On October 10, 2001, the Court granted the Motion to Compel. On October 10, 2001, Defendant, while noting that it had received the Motion to Compel, stated that it "must respectfully continue to decline to comply with OFCCP's propounded discovery."

On October 11, 2001, OFCCP filed a Motion for Sanctions and a Motion for Summary Judgment. On October 26, 2001, Defendant filed a response thereto.

SANCTIONS

OFCCP requests the Court to enter an order finding that Defendant's refusal to provide responses on the "single entity" issue creates a "presumption that the answer, if given, would be unfavorable" to Defendant, and therefore, Defendant and all of its subsidiaries are a single entity for purposes of debarment.

29 C.F.R. §18.6(d)(2) of the Office of Administrative Law Judges Rules of Practice and Procedures provides:

> If a party ... fails to comply ... with an order, including, but not limited to, an order for ... the production of documents, or the answering of interrogatories, ... the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
>
> > (i) Infer that the ... document or other evidence would have been adverse to the non-complying party;
> >
> > (ii) Rule that for purposes of the proceeding the matter or matters concerning which the order ... was issued be taken as established adversely to the non-complying party;
> > ...
> >
> > (v) Rule ... that a decision of the proceeding be rendered against the non-complying party ...

I have reviewed the interrogatories and request for production that OFCCP has served on Defendant. I find all the requested information relates to the issue on remand --whether Defendant and its subsidiaries are a single entity. In failing to provide the requested information, Defendant has violated the order of the Court.

OFCCP requests the Court to enter an order finding that Defendant's refusal to provide responses on the "single entity" issue creates a "presumption that the answer, if given, would be unfavorable" to Defendant, and therefore, Defendant and all of its subsidiaries are a single entity for purposes of debarment. Under the circumstance, I find that the appropriate remedies are those set out in 29 C.F.R. §18.6(d)(2)(i) and (ii).[1] Therefore, I find that the requested responses, if given, would have been adverse to the Defendant on the single entity/single employer issue. I also find that the requested responses, if given, would have been adverse to the Defendant on the collateral estoppel issue concerning the parent/subsidiary relationship. For purposes of this proceeding, all matters concerning the relationship between Defendant and its subsidiaries will be taken as established adversely to Defendant.

COLLATERAL ESTOPPEL

The District Court affirmed the order upholding OFCCP's procedures, however, remanded the case to determine whether Defendant and its subsidiaries should be considered a single entity so that the subsidiaries could be sanctioned for the actions of the corporate parent. OFCCP asserts the remanded issue has already been fully litigated and decided in proceedings before the National Labor Relations Board (NLRB) and the legal doctrine of collateral estoppel applies.

It is appropriate to apply the doctrine of collateral estoppel when an administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate. Courts apply a five-factor test to determine whether preclusive effect will be given to the prior fact finding: (1) the party in the first action must be the same or in privity with the party in the second action against whom collateral estoppel is sought; (2) there must be an identity of issues; (3) the parties must have had a sufficient opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped must have been actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estoppel must have been necessary to the administrative decision. The burden of proving all the elements of collateral estoppel rests with the party relying on the prior adjudication. Pantex Towing Corp. v. Glidewell, 763 F.2d 1241 (11th Cir. 1985).

[1] 41 C.F.R. §60-30.15(j) authorizes the Administrative Law Judge to impose similar sanctions against a party failing to obey an order compelling discovery.

Background of prior litigation

In 1991, a complaint was issued against Beverly California Corporation F/K/A Beverly Enterprises alleging unfair labor practices at a group of 17 nursing home facilities. Beverly Cal. Corp., 326 NLRB No. 29, at 173(1998) (Beverly II). The complaint alleged that Beverly California Corporation and its nursing home operating divisions, regions, wholly-owned subsidiaries, and individual facilities constituted a single integrated business operation and a single employer within the meaning of the National Labor Relations Act. Beverly California Corporation denied single-employer status.[2] At hearings held over a 16 month period, Beverly California Corporation contested the single employer allegations. ALJ Donnelly found that Beverly California Corporation is a California corporation, formerly known as Beverly Enterprises, which either owns, manages, or leases approximately 846 nursing homes in 34 states and the District of Columbia. As a result of a merger in 1987, it became part of Beverly Enterprises, Inc., a holding company with other holdings in the health care industry. In 1989, Beverly California Corporation's corporate headquarters relocated to Fort Smith, Arkansas. Overall responsibility for corporate operations resides in the Board Chairman and CEO, David Banks.

ALJ Donnelly concluded that all of the criteria set out in Radio & Television Broadcast Technicians Local 1264 v. Broadcast Services of Mobile, Inc., 380 U.S. 255 (1965), had been met and the record fully supported the conclusion that Beverly California Corporation and its subordinate entities are a single-integrated enterprise, and a single employer within the meaning of the National Labor Relations Act. ALJ Donnelly recommended corporate-wide sanctions.

In 1993, another complaint was issued against Beverly California Corporation F/K/A Beverly Enterprises regarding unfair labor practices at another group of nursing home facilities. Beverly Cal. Corp., 326 NLRB No. 30, at 242 (1998) (Beverly III). ALJ Cullen took notice of and received the testimony and exhibits from Beverly II concerning the single-employer issue for purposes of deciding the issue in Beverly III. ALJ Cullen also took additional testimony and received exhibits in Beverly III concerning the single-employer issue. As did ALJ Donnelly in Beverly II, ALJ Cullen laid out extensive findings of fact concerning the single-employer issue. ALJ Cullen found the evidence presented in Beverly II and Beverly III "concerning single-employer status overwhelmingly demonstrates that Respondent is a single employer within the meaning of the Act."

[2] In an earlier unfair labor practice case before the NLRB, Beverly California Corporation admitted it was a single employer with all its operating divisions and individual facilities. Beverly Cal. Corp., 310 NLRB No. 37, at 222 (1993) (Beverly 1).

Beverly California Corporation appealed both cases to the NLRB. The NLRB issued orders upholding the ALJs findings on the single-employer issue and issued a corporate-wide cease-and-desist order in Beverly III, 326 NLRB No. 30, at 232.

On September 13, 2000, the Court of Appeals for the Seventh Circuit ruled that the NLRB was entitled to issue a corporate-wide cease-and-desist order against Beverly California Corporation. The Court observed that the NLRB ALJs had specifically held, over Beverly California Corporation's objection, "that Beverly is a single employer, a single integrated enterprise with a unified labor relations policy." Although noting that Beverly did not raise the single-employer issue on appeal, the Court noted that the ALJs "found the evidence on this point to be overwhelming, and we agree." Beverly Cal. Corp. v. NLRB, 227 F.3d 817, 828 (7th Cir. 2000).

In Beverly Health and Rehabilitation Services, Inc., 328 NLRB No. 122 (1999) (Beverly IV) the General Counsel requested the ALJ to take judicial notice of the Board's decisions in Beverly I, II and III that Beverly was a single employer. Consistent with the finding in Beverly III, the ALJ found "that Respondent Beverly is a single employer." This finding was affirmed by the Board.

The party in the first action must be the same or in privity with the party in the second action against whom collateral estoppel is sought

For collateral estoppel to apply, Beverly California Corporation must be the same or in privity with Defendant, Beverly Enterprises, Inc. The prevailing law recognizes that subsidiaries are sufficiently identified with their parents to satisfy the "in privity" requirement for purposes of res judicata or collateral estoppel. Pan Am. Match, Inc. v. Sears, Roebuck & Co., 454 F.2d 871, 874-875 (1st Cir.), cert. denied, 409 U.S. 892 (1972). For that reason, a parent is bound by a finding against a subsidiary in a prior suit. United States v. Texas, 158 F.3d 299, 306 (5th Cir. 1998). (The Plaintiff contended that "[t]he parent/subsidiary relationship of ICA and ISA, though potentially relevant, is not dispositive." The Fifth Circuit found this contention unpersuasive in light of the court's clear holdings to the contrary.) Jefferson Sch. of Soc. Scis. v. Subversive Activities Control Bd., 331 F.2d 76, 82 (D.C. Cir. 1963) (recognizing that subsidiary corporation is held to be in privity with its parent with respect to the common corporate business).[3]

[3] The privity requirement for purposes of res judicata or collateral estoppel is not the same as the guidelines developed by the Secretary of Labor for determining whether a parent and subsidiary are to be considered as a single entity for purposes of developing an affirmative action program. Therefore, Defendant's argument that Judge Urbina rejected the parent/subsidiary theory for purposes of collateral estoppel is misplaced.

Based on Defendant's refusal to comply with this Court's discovery orders, I find that Beverly California Corporation and Beverly Health & Rehabilitation Services are subsidiaries of Beverly Enterprises, Inc. and that the NLRB litigation was a matter of common corporate business. Accordingly, for purposes of collateral estoppel, I find Beverly California Corporation and Beverly Health & Rehabilitation Services in privity with Beverly Enterprises, Inc.

As noted by the Judge Urbina, the record contains some evidence suggesting a close link between Defendant and its subsidiaries. *See* R. at 974-975 (Defendant's vice president stating it owns and operates the subsidiaries; R. at 713-36 (contract includes both the Defendant and its subsidiaries); R. at 834-836 (plaintiff and subsidiaries share a building). An examination of the previous Beverly cases points to other close links between Defendant and its subsidiaries, in particular Beverly California Corporation. David Banks is the Board Chairman and CEO of Beverly California Corporation. The instant case was initiated by a letter to David Banks, identified as the CEO of Defendant. (R. 702). The original contract in the instant case lists the contractor as Beverly Health & Rehabilitation Services. The contract lists the Fort Smith, Arkansas, address – Attn: Mr. Jeff Hutton, Vice President, Finance & Reimbursement. (R. 713). The contract acknowledges that Respondent is a common parent of Beverly Health & Rehabilitation Services (R. 726). The contract defines "common parent" as a "corporate entity that owns or controls an affiliated group of corporations that files its Federal income tax returns on a consolidated basis, and of which the offeror is a member." (R. 725). The contract was later modified to extend the contract for option year two to September 1, 1999. The modification lists the contractor as Beverly Enterprises with the Fort Smith, Arkansas, address and "Attn: Jeff E. Hutton." (R. 714).

As noted previously, in Beverly Health and Rehabilitation Services, Inc., 328 NLRB No. 122 (1999) the ALJ was requested to take judicial notice of the Board's decisions in Beverly I, II and III that Beverly was a single employer. Consistent with the finding in Beverly III, the ALJ found "that Respondent Beverly is a single employer." This finding was affirmed by the Board.

Based on the entirety of the record, I find that, despite the name differences and technical legal distinctions, that Beverly Enterprises, Inc., Beverly Health and Rehabilitation Services, Inc., and Beverly California Corporation are alter egos of each other. Given the identity of business purpose, corporate headquarters and high level management, I find that Defendant was not only on notice of the earlier litigation, but was represented by its alter ego in that litigation.

There must be an identity of issues between the previous cases and the instant case

Defendant asserts the NLRB cases fail to satisfy the collateral estoppel requirement that OFCCP demonstrate the identical nature of the issue allegedly resolved in the prior litigation and the issue in the

instant case. However, contrary to Defendant's argument, the issues need not be identical, there need only be an identify of issues. It has been held sufficient if the claims closely resemble each other and are virtually the same allegations. The issue in the present suit must be "in substance the same" as that decided in the previous litigation. Montana v. United States, 440 U.S. at 155, 99 S.Ct. at 974-75; *See also* Connors v. Tanoma Min. Co., Inc. 953 F.2d 682 (D.C. Cir. 1992) ("in substance the same"); Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981) ("substantially the same"); In Re Imperial Corp. of America, 92 F.3d 1503 (9th Cir. 1996); *cf*. Gould v. Mossinghoff, 711 F.2d 396 (D.C. Cir. 1983) ("identical" comparing to patent infringement litigation where identity of issues requirement is narrowly interpreted).

In light of Defendant's failure to comply with this Court's order regarding discovery, Defendant will not be heard to challenge OFCCP's assertion that Beverly Health and Rehabilitation Services, Inc., is a subsidiary of Beverly Enterprises, Inc. and a sister corporation to Beverly California Corporation. The propounded discovery was directed to resolving the issue concerning the interrelationship between the various Beverly corporations. In Beverly IV(which involved Beverly Health and Rehabilitation Services, Inc.) ALJ Carson found that "Consistent with the finding of Beverly III" (which involved Beverly California Corporation) "that Respondent Beverly is a single employer." Certainly ALJ Carson had resolved the single employer issue up to the level of Beverly Health and Rehabilitation Service, Inc. Given Defendant's failure to answer the propounded discovery and my previous finding that Defendant Beverly Health and Rehabilitation Services, Inc., and Beverly California Corporation are the alter egos of each other, I find the single employer issue as addressed in the previous Beverly cases is in substance the same as the issue in the instant case.

The parties must have had a sufficient opportunity to litigate the issues in the previous case

The Beverly II and Beverly III complaints alleged single-employer status and Beverly denied such status. It is obvious from the decisions and I find that Defendant had a sufficient opportunity to litigate the single-employer issue in the previous cases.

The issues to be estopped must have been actually litigated and determined in the previous case

I find the single-employer issue was vigorously litigated in the NLRB proceedings and the NLRB reached a final decision on this issue when it affirmed the findings of the ALJs on the single employer issue.

The findings on the issues to be estoppel must have been necessary to the administrative decision.

The findings on the single-employer issue were necessary in order to determine whether the NLRB could issue and enforce a corporate wide cease-and-desist order and require posting of notices at Beverly facilities. I find the findings on the single-employer issue were necessary in the NLRB litigation.

I find that the doctrine of collateral estoppel applies. Accordingly, I find that Defendant and its subsidiaries are a single entity and that a corporate wide remedy is appropriate.

SINGLE EMPLOYER

Even if the doctrine of collateral estoppel did not apply, based on the record now before me, I find that Defendant and its subsidiaries should be considered a single entity so that the subsidiaries could be sanctioned for the actions of the corporate parent. Applying the five-factor test established by the Secretary of Labor, I find the subsidiaries were adequately represented by Defendant in the OFCCP litigation.

The parent and subsidiaries have common ownership

I find that the requested discovery responses, if given, would have been adverse to the Defendant on the single employer issue. As it relates to common ownership, Interrogatories 2-4 specifically seek information concerning the ownership of Defendant and its subsidiaries. I find that the responses to all the interrogatories and requests for production generally, and the responses to Interrogatories 2-4 specifically, would have disclosed that Defendant and its subsidiaries have a common ownership.

The parent and subsidiaries have the same directors and/or officers

I find that the requested discovery responses, if given, would have been adverse to the Defendant on the single employer issue. As it relates to common directors and officers, Interrogatories 5-6 specifically seek information concerning the directors and officers of Defendant and its subsidiaries. I find that the responses to all the interrogatories and requests for production generally, and the responses to Interrogatories 5-6 specifically, would have disclosed that Defendant and its subsidiaries have the same directors and officers.

The parent has de facto control of the subsidiaries

I find that the requested discovery responses, if given, would have been adverse to the Defendant on the single employer issue. As it relates to *de facto* control of its subsidiaries, Interrogatories 12-15

specifically seek information concerning the Defendant's control of its subsidiaries. I find that the responses to all the interrogatories and requests for production generally, and the responses to Interrogatories 12-15 specifically, would have disclosed that Defendant has *de facto* control of its subsidiaries.

The personnel policies of the parent and the subsidiaries emanate from a common source

I find that the requested discovery responses, if given, would have been adverse to the Defendant on the single employer issue. As it relates to whether personnel policies of Defendant and its subsidiaries emanate from a common source, Interrogatories 7-11 and 17-37 specifically seek information concerning the personnel policies of Defendant and its subsidiaries. I find that the responses to all the interrogatories and requests for production generally, and the responses to Interrogatories 7-11 and 17-37 specifically would have disclosed that the personnel policies of Defendant and its subsidiaries emanate from a common source.

The operations of the parent and the subsidiaries are dependent on each other

I find that the requested discovery responses, if given, would have been adverse to the Defendant on the single employer issue. As it relates to whether the operations of the parent and the subsidiaries are dependent on each other, Interrogatories 38-47specifically seek information concerning this issue. I find that the responses to all the interrogatories and requests for production generally, and the responses to Interrogatories 38-47 specifically, would have disclosed that the operations of Defendant and its subsidiaries are dependent on each other.

Accordingly, I find the Defendant and its subsidiaries are one entity under the five-factor test established by the Secretary of Labor and that the subsidiaries were adequately represented by the Defendant at the hearing. I find the Defendant and its subsidiaries may be considered one entity for purposes of debarment.

RECOMMENDED ORDER

Based on the foregoing, I recommend that the Secretary enter the following order:

1. Beverly Enterprises, Inc., and its subsidiaries are **ORDERED** to cease and desist from violating Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act.

2. Beverly Enterprises, Inc., and its subsidiaries are **ORDERED,** no later than 30 days from the issuance of this Order, to cease and desist from denying the Office of Federal Contract Compliance Programs, U.S. Department of Labor, access to its AAPs and supporting documentation and its premises at Fort Smith, Arkansas, to conduct an on-site corporate management review, including interviews and inspection of records and other materials as may be relevant and material to verifying Beverly's compliance status.

3. Should Beverly Enterprises, Inc., and its subsidiaries fail to comply with this Order within thirty days of its issuance, it is further **ORDERED** that the present government contracts and subcontracts of Beverly Enterprises, Inc., and its subsidiaries, be canceled, terminated, or suspended, and that Beverly Enterprises, Inc., and its subsidiaries be declared ineligible for further contracts and subcontracts, and from extension or modification of any existing contracts and subcontracts, until such time that it can satisfy the Secretary of Labor or her designee the Deputy Assistant Secretary for OFCCP, that it is in compliance with the provisions of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act, and the regulations issued pursuant thereto, which have been found here to have been violated.

SO ORDERED

A
LARRY W. PRICE
Administrative Law Judge

LWP:map